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IN THE

SUPREME COURT OF THE

UNITED STATES

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October Term, 1969
No. 1079 [redacted]

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GROVER G. ALEXANDER
Petitioner

v.

CHARLES SHARPE
Respondent

---

STATE OF MAINE
Respondent

v.

GROVER G. ALEXANDER
Petitioner

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# BRIEF IN OPPOSITION

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JOHN W. BENOIT, JR., Esquire
Deputy Attorney General
State House, Augusta, Maine
Counsel for Respondent

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## OPINIONS BELOW

The two opinions below that are made the subject of the Petition have been reported for some time in 257 A.2d 778 (October 17, 1969) and 245 A.2d 279 (August 15, 1968).

## JURISDICTION

An examination of the Petition clearly indicates that it fails to confer jurisdiction on the Court. Note that the cover of the Petition captions two cases; and that those two cases are printed in the Appendix to the Petition. The "Statement of the Case" and the "Reasons for Granting Writ" contain references to both those opinions; the latter section of the Petition being devoted entirely to the first opinion dated August 15, 1968. Although the Petition prays for review of an opinion below dated October, 1969, the remaining parts of the Petition are devoted to an exposition converning the August, 1968 opinion. Petitioner does this for good reason; it is the August,

1968 opinion which decides the points contested by Petitioner; not the October, 1969 opinion. If that were not so, the Petitioner would have concluded his "Reasons for Granting Writ" by a reference to the October, 1969 opinion; but he did not do so.

Petitioner seeks review of the August, 1968 opinion sans compliance with Rule 22(1) of this Court. 28 U.S.C. § 2101(d). The time for filing a Petition concerning that opinion has long since expired.

## QUESTIONS PRESENTED

Although Petitioner has framed several questions for the Court's attention, Respondent submits the following three questions for consideration:

1. Should a Petition be granted which is out of time?

2. Should a Petition which misstates material facts be granted?

3. Should a Petition be granted without reason?

## STATEMENT OF THE CASE

The Petitioner misstates material facts. Petitioner admits making a charge against the Trial Judge in the presence of the jury, that: "I think it demonstrates your prejudice without doubt"; but Petitioner claims the remark followed " * * * an exchange between Court and Counsel wherein the Court shouted at Petitioner, accused him of being incompetent, and otherwise caused the Petitioner great embarrassment in the presence of the jury. * * * " (Petition, p. 4) There is no basis for Petitioner's claim in the Record; and he admits as much: "Unfortunately, the precise language of the Court and Petitioner was not recorded by the Reporter." (Id., p. 5)

Does Petitioner have a right to misstate facts? Continuing, Petitioner next claims that the exchange between the Court and counsel " * * * began after an incorrect ruling by the Court adverse to the Petitioner * * * ." (Ibid.) Again, where does the Record state that the ruling has been declared incorrect? Such self-serving remarks are most misleading. Finally, Petitioner concludes his "Statement of the Case" with a denial that he pointed his finger at the judge during his charge of prejudice: " * * * Petitioner was at all times pointing and referring to the chalkboard * * * ." (Id., p. 7) Where does that appear in in the Record? One wonders why Petitioner felt compelled to make these self-serving statements as a basis for the Writ.

The facts of the case should be stated sans distortion. On July 6, 1967, Petitioner was counsel in a tort case being tried before a jury. At approximately 4:45 p.m., Petitioner made a remark following a ruling by the judge: "I think it demonstrates your prejudice without doubt." (Trial Transcript, p. 152) Court was then adjourned until the next day; when the matter was discussed in chambers. Court convened and both the judge and the attorney made comments before the jury about the matter. A request for a mistrial was granted. Petitioner was adjudged to have committed a contempt; and he was sentenced to 5 days in jail and to pay a fine of $500. It is that set of facts, briefly stated, that gives rise to the Petition.

## ARGUMENT

### I.

### THE PETITION, BEING OUT OF TIME, SHOULD BE DISMISSED.

Rule 22(1) of this Court requires that a Petition for the Writ of Certiorari be filed within 90 days next following the date of the final judgment sought to be reviewed. (The case is not involved with an extension of that period.) The present Petition clearly indicates that it is grounded upon the August, 1968 opinion (Petition, p. 7-10); and we agree with the Petitioner that the August, 1968 opinion is the one which contains all the material made the subject of the "Reasons for Granting Writ". But that does not give Petitioner license to ignore Rule 22(1). Petitioner seeks to avoid a

dismissal by ringing in the October, 1969 opinion solely for that purpose; while ignoring it for any other purpose.

II.

SELF-SERVING MISSTATED MATTERS ARE NOT A BASIS FOR THE WRIT.

The "Reasons" for granting the Writ contain a recital that: " * * * the alleged contemptuous conduct involved a criticism of and an accusation of prejudice on the part of the Presiding Justice. * * * " (Petition, p. 8) That unsupported remark, noted in an earlier part of the Petition (Id., p. 4), seeks importance out of repetition. But why has the Petitioner chosen not to re-acknowledge the absence of Record support for his statement (Id., p. 5). Continuing, the "Reasons" advanced

by Petitioner state, inter alia, " * * * the Court apparently considered the remarks of the Petitioner after the alleged contempt, both in Court and in chambers, as evidence of guilt. * * * ." (Emphasis ours.) (Id., p. 8) Such a remark is pure surmise; and Respondent objects to it, and to the other misstatements noted, as a basis for the Writ.

## III.

## IN ANY EVENT, THE DECISIONS BELOW ARE CORRECT.

Respondent contends that even if the Petition is not dismissed for the aforesaid reasons, the opinions below are correct.

A. The Questioned Opinions of the Supreme Judicial Court are in Accord with Applicable Decisions of this Court.

Petitioner claims the trial court judge lost jurisiction to adjudge contempt the day following its occurrence; and that the judge's certificate was filed late. One federal court has decided that just such an overnight delay was not only proper, but laudable; and that the word "summarily" in the Federal Rules relating to punishment for contempt did not require

a hasty decision. In re Osborne, 344 F.2d 611 (9th Cir.). Other cases opposed to Petitioner's claim are: Hallinan v. United States, 182 F.2d 880; United States v. Gallante, 298 F.2d 72; and Sacher v. United States, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952). As for the alleged late filing of the certificate, it seems enough to note that the certificate was filed following remand of the matter from the Law Court with direction that the same be filed pursuant to Rule 42(a), Maine Rules of Criminal Procedure; a counterpart of the corresponding Federal Rule.

Language in the Petition leads to the conclusion that Petitioner is unsure about his challenge to the opinions below:

(1) That the State Court has decided substantial federal questions in a way " * * * probably not in accord with applicable decisions * * * " of this Court (Petition, p. 7); and (2) That the filing of the certificate following remand of the case " * * * seems to constitute former jeopardy." (Id., p. 9) (Emphasis supplied.) Petitioner's lack of certainty surfaces in his discussion of Gompers v. Bucks Stove Co., 221 U.S. 418. That case is distinguishable on facts. It has long been recognized that the power of a court to punish summarily for a contempt committed in its presence is inherent in the nature and constitution of the court. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

The Petitioner's assertions to the contrary, the opinions below contain accurate applications of Federal cases to the contention that jury trial was a necessity. Duncan v. Louisiana, 391 U.S 145, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968); Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed.2d 522 (1968). Although DeStefano v. Woods, 392 U.S. 631, 88 S. Ct. 2093, 20 L.Ed.2d 1308 (1968) held that the constitutional principles announced in Duncan and Bloom were not applicable to cases commenced before May 20, 1968, thus excluding the instant case from their holdings, the "opinions below" considered the effect of Duncan and Bloom upon contempt actions in Maine courts. Alexander v. Sharpe, 245 A.2d 279, 284 (1968). Specifically,

the Law Court applied Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed.2d 629 (1966) wherein this Court "found constitutionally permissible a summary conviction for contempt without a jury trial in a federal court in which a sentence of six months was imposed, finding this to be a 'petty' offense." (Ibid.)

Petitioner's position to the contrary, the opinions below have not settled something new under the sun. (Petition, p. 9) Petitioner's comments on right of trial by jury are grounded on provisions of the State Constitution; there being no mention of the Federal Constitution. No federal question is raised. Instead, Petitioner seeks to apply a State Constitutional provision

relating to trial by jury to all criminal actions of every name and description. The Law Court has held that contempts of court committed in the court's presence may be summarily punished. Androscoggin & K. R. Co. v. Androscoggin R. Co., 49 Me. 392. But the Law Court is not unmindful of the decisions of this Court in this area. Alexander v. Sharpe, supra, p. 284.

Petitioner's remaining claims are headed 'former jeopardy' and 'excessive sentence'. Surely, no former jeopardy resulted from a remand of the matter with direction that a Rule 42(a) certificate be filed. As a general rule, a person may be resentenced following disposition of an appeal or habeas corpus without being put in jeopardy

twice for the same offense. 22 C.J.S., Criminal Law, §§ 209, 210, 267, 273. Allen v. State, 260 Ala. 324, 77 So.2d 44 and Northcott v. Hand, 186 Kan. 662, 352 P.2d 450. Next, it is difficult to perceive how the sentence was excessive. Punishment for criminal contempt is within the sound discretion of the sentencing court and, in the absence of abuse, cannot be disturbed on appeal. Keyes v. United States, 314 F.2d 123 (9th Cir.). The punishment must be in proportion to the offense committed. Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793. Here, the sentence bears a reasonable relation to the nature and gravity of the contumacious conduct. United States v. Conole, 365 F.2d 306, cert. den. 385 U.S. 1025. Also see

In Re Osborne, supra, 10 day jail term upheld; and United States v. Schiffer, 351 F.2d 91, 60 days imprisonment sustained.

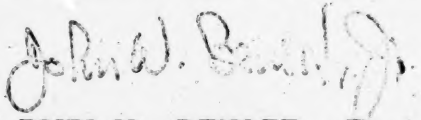
B. Petitioner Attempts to Relitigate the Facts of the Case as Basis for the Writ.

Petitioner believes the evidence is inadequate to support the judgment of contempt; and that what he did was merely "aggressive advocacy". (Petition, p. 10) Such self-serving remarks should not be the basis for the Writ. We need not, for example, inquire of the Petitioner as to his definition of contempt.

## CONCLUSION

The Writ should not be granted this Petitioner because the Petition is out of time, is grounded on misstatements of fact, and the "opinions below" are correct.

Respectfully submitted,



JOHN W. BENOIT, Jr.
Deputy Attorney General

## CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit a copy of the above Brief in Opposition in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to petitioner's attorney as follows: William A. Mann, Esquire, 308 Colorado Building, Washington, D.C.

Dated:
January 28, 1970

John W. Benoit, Jr.

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